2017

Sean Kendall, Appellant, v. Brett Olsen, Lt. Brian Purvis, Joseph Allen Everett, Tom Edmundson, George S. Pregman, and Salt Lake City Corporation, Appellees.

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

SEAN KENDALL, *Appellant*, v. BRETT OLSEN, LT. BRIAN PURVIS, JOSEPH ALLEN EVERETT, TOM EDMUNDSON, GEORGE S. PREGMAN, AND SALT LAKE CITY CORPORATION, *Appellees*.	Appellate Case No. 20150927-SC

SUPPLEMENTAL BRIEF OF APPELLANT SEAN KENDALL

Appeal From the Third Judicial District Court, Salt Lake County,
Before the Honorable Heather Brereton and the Honorable William Barrett

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78A-3-102(3)(j).

STATEMENT OF ISSUE, STANDARD OF REVIEW, AND PRESERVATION OF ISSUES IN THE TRIAL COURT

ISSUE: As described in the Brief of Appellant Sean Kendall ("Kendall") ("App. Brief"), at 1, the issue in this appeal is as follows:

> Do the discriminatory and excessively burdensome attorneys' fee and costs bond requirement of Utah Code Ann. § 78B–3–104 ("the Bond Statute") and the discriminatory costs undertaking requirement of Utah Code Ann. § 63G-7-601 ("the Undertaking Statute") violate the equal protection, freedom to petition, and due process guarantees of the Utah and United States Constitutions, and the Open Courts Clause of the Utah Constitution, both facially and as applied to Appellant Sean Kendall ("Kendall")?

This Supplemental Brief is being filed, pursuant to the Supplemental Briefing Order of the Utah Supreme Court dated December 22, 2016, because "the posture before the Supreme Court creates a material difference in the argument presented." (Supplemental Briefing Order, at 1.) Specifically relating to the issue presented is the question of whether *Zamora v. Draper*, 635 P.2d 78 (Utah 1981), the case primarily relied upon by Appellees (collectively "the City") and the trial court, should be overruled because it baselessly manufactured a means of avoiding the serious constitutional defects in the statute under consideration and arrived at the wrong conclusion, after applying the incorrect standards (or no standards at all), regarding the facial unconstitutionality of the bond statute there under consideration. The Utah Supreme Court is in a position to overrule the poorly reasoned, unprincipled decision in *Zamora*, which has generated

tremendous injustice over the years. The Utah Court of Appeals would not have had the capacity to overrule *Zamora*.

STANDARD OF REVIEW: "[T]he constitutionality of a statute is a question of law to be reviewed for correctness, giving no deference to the trial court," as noted in App. Brief, at 1. Further, in cases asserting a violation of article I, section 11 ("the Open Courts Clause") of the Utah Constitution, a majority of the Utah Supreme Court has refused to presume the constitutionality of a statute alleged to deprive a party of access to the courts or to a remedy. As a majority of the Utah Supreme Court noted, "this court has consistently rejected the presumption of constitutionality of statutes challenged under the remedies clause of article I, section 11." *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 50, 67 P.3d 436 (Durham, C.J., dissenting) (writing for a majority of the Court).[1] *See also Currier v. Holden*, 862 P.2d 1357, 1362–63 (Utah Ct. App. 1993) ("because [the statute under review] impacts . . . a civil remedy . . . protected under Article I, Section 11 of the Utah Constitution, the usual presumption of validity does not control our review of

[1] Appellant's Reply Brief, at 24, cites to ¶ 8 of *Wood* as indicating that the "Utah Supreme Court rejected a blanket application of heightened scrutiny to every challenge under Article I, section 11." That was, regrettably, an erroneous reading of the authority of ¶ 8 of *Wood*. As Chief Justice Durham's dissent makes clear, the statement regarding the standard of review in the lead opinion is a minority view, departing from the Utah Supreme Court's "carefully crafted and long relied-on analytic model in article I, section 11 cases." *Wood*, 2002 UT 134, ¶ 43, 67 P.3d 436 (Durham, C.J., dissenting) (writing for a majority of the Court). As is made clear in *Wood*, the "majority view" is that there should be a "heightened level of scrutiny" and a continued rejection of the "presumption of constitutionality" where significant constitutional rights are claimed to have been abrogated by a statute. *Id.*

this statute").[2]

PRESERVATION OF ISSUE ON APPEAL: Kendall has identified in the Brief of Appellant, at 2, the abundant record of Kendall's preservation of the primary issue on appeal. References to the specific issue relating to the continued viability and applicability of *Zamora*, and the centrality of *Zamora* to the arguments of the City, as well as to the decision of the trial court that the Bond and Undertaking Statutes (Utah Code Ann. §§ 78B–3–104 and 63G–7 601, respectively) are constitutional, are found throughout the proceedings below.[3]

ARGUMENT

I. *ZAMORA* HAS CAUSED THE DEPRIVATION OF ACCESS, AND EXCESSIVE DELAYS IN GAINING ACCESS, TO UTAH STATE AND FEDERAL COURTS.

Kendall has experienced tremendous delay, expense, and discriminatory treatment in this matter (*see* App. Brief, at 33–34) as a result of the reliance on *Zamora* by the City and the trial court. Counsel for the City argued before the trial court as follows:

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[2] The trial court erroneously applied a presumption of constitutionality to the Bond and Undertaking Statutes challenged by Kendall, as follows:

> Further, it is well settled that a statute "is presumed constitutional, and [that a court will] resolve any reasonable doubt in favor of constitutionality." (Quoting *Tindley v. Salt Lake City School Dist.*, 2005 UT 30, ¶ 11, 116 P.3d 295.)

R. 550. *Tindley* incorrectly applied the *general* standard of review, which had theretofore consistently been rejected in cases involving Open Courts Clause challenges to statutes, citing as authority only *Utah Sch. Bds. Ass'n v. State Bd. of Educ.*, 2001 UT 2, ¶ 9, 17 P.3d 1125, a case that did not involve an open courts challenge nor *any* claim under article I of the Utah Constitution.

[3] *See, e.g.*, R. 194–201; 325–37; 342–43; 375; 442; 546; 550–51; 646–50; 652–54; 780–84; 785–88.

> This Court is required to find the bond and undertaking statutes constitutional. . . . [T]he Utah Supreme Court has already held the bond statute is constitutional.

R. 325 (citing *Zamora* and *Snyder v. Cook*, 688 P.2d 496 (Utah 1984)).

> Until and unless Plaintiff satisfies "the substantial burden" of convincing the Utah Supreme Court that its decisions in those cases were wrong, the decisions in *Zamora* and *Snyder* are binding on this Court and the decisions from other states are unavailing.

R. 322.

The trial court, failing to engage in any due process, equal protection, open courts, or freedom-to-petition analysis, relied almost entirely (and blindly) on *Zamora* in ruling that the Bond and Undertaking Statutes are constitutional, stating as follows:

> In the instant, the Utah Supreme Court has already held the bond statute is constitutional. *Zamora v. Draper*, 635 P.2d 78, 80–82 (Utah 1981) (holding prior bond statute with substantially the same language constitutional in the ordinary and usual circumstances); *Snyder v. Cook*, 688 P.2d 496 (Utah 1984) (same). . . . Moreover, like the bond statute, the undertaking statute contains the same language that the "sum be fixed by the court" that the Court in *Zamora* found important and gave courts flexibility to determine whether the statute would be unconstitutional as applied to a particular plaintiff.

R. 550–51.[4]

A bare citation to *Zamora* (or one of the cases that have blindly followed *Zamora* in its destructive wake) seems to simply lull the courts—state and federal—into a slumberous failure to analyze the glaring constitutional defects of the Bond and Undertaking Statutes. *See, e.g., Rippstein v. City of Provo*, 929 F.2d 576, 577–578 (10th Cir. 1991) (citing *Snyder* and *Zamora*, without any analysis, the court simply stated

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[4] Likewise, in *Snyder*, 688 P.2d at 498, this Court engaged in no constitutional analysis and relied solely on *Zamora*. Because plaintiffs did not "contend that they are impecunious or unable to furnish the bond," the Court upheld the bond simply because "[i]n *Zamora* this Court held that the statute requiring an undertaking was constitutional and served the public interest." *Id.*

"[s]ection 78–11–10 has been upheld as constitutional."); *Mglej v. Garfield Co.*, 2014 WL 2967605, Case No. 2:13-cv-713, *2 (D. Utah, July 1, 2015) (without any mention of a constitutional issue, the court concluded, citing *Rippstein*, that plaintiff's "failure to post an undertaking and bond necessitates dismissal"); *Webecke v. Salt Lake City*, Case No. 2:13-cv-1132, at 2 (D. Utah, April 22, 2015) (without any reference to any constitutional issue, and citing *Rippstein*, the court held that "[b]ecause Plaintiff failed to file the required undertaking and bond at the time the Complaint was filed, Defendants Motion to Dismiss . . . must be granted."); *Webb v. Scott*, 2015 WL 1257513, Case No. 1:11-cv-128, at *14 (D. Utah Mar. 18, 2015), *reconsideration denied*, 2015 WL 2183124 (D. Utah May 8, 2015), *aff'd. in part, rev'd in part, on other grounds, and remanded*, 643 Fed.Appx. 711 (10th Cir. 2016) (without any mention of a constitutional issue, the court stated: "[g]iven Plaintiff's failure to cite any facts that he complied with Utah Code Ann. § . . . 78B–3–104, he has failed to present a genuine issue of material fact on his state law claims.").

The Bond and Undertaking Statutes—and the cases applying them in a manner at odds with due process, equal protection, and the constitutional guarantees of access to the courts and the right to petition—have had tremendously discriminatory, unjust, and court-access-chilling effects. Those effects are not found merely in *Zamora*'s repugnant legacy of unreasoned case law, but also in the ongoing injustices and denials of access frequently faced by victims, indigent and non-indigent alike,[5] of wrongdoing by law

[5] "It is immaterial that a defendant can afford to be deprived of his property, or that other means are available to alleviate his situation. Denial of due process affects the rich as

enforcement officers whose state law claims remain unvindicated because of the oppressive, burdensome, and discriminatory Bond and Undertaking Statutes and because they give up when they find justice so elusive, if not impossible, to obtain. *See* App. Brief, at 16–17.[6]

One class of tort victims faces a discriminatory and unjust reality: A victim seeking justice under state law for an injury caused by a law enforcement officer learns that if he or she is seeking to pursue a state law claim against a law enforcement officer, he or she could be bankrupted if the case is lost—even though the case is meritorious—because of a unique statute, applying only to claims against law enforcement officers, that allows an award of attorneys' fees and costs against a losing plaintiff.

Then, the victim learns that, unlike any other people who have suffered injuries at the hands of people *other* than law enforcement officers, he or she must (1) before filing a Complaint, obtain a determination by a judge (with no legal procedure as to how that is to be done) regarding the amount of attorneys' fees and costs that will be incurred in the future by a law enforcement officer sued by the victim and (2) post a bond, before filing a Complaint, in the amount "found" by the court to be the fees and costs that will be incurred in the future by the law enforcement officer.

If the victim—having learned of the tremendously unfair, arbitrary, and discriminatory treatment of those who seek justice for violations of state laws by law

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well as the poor." *Brooks v. Small Claims Court*, 504 P.2d 1249, 1255 (Cal. 1973) (in bank).

[6] The filing of a bond for future attorney's fees and costs under § 78B–3–104 "is an absolute bar in essence to any constitutional action for most people." R. 744. "They finally just shake their heads and say there is no justice and they just walk away." R. 728.

enforcement officers—is not deterred from seeking access to the courts, it could be only because (1) the victim has enough resources or is so certain of victory that he or she is not concerned about a potential liability of hundreds of thousands of dollars for fees and costs in the event the case is lost; (2) the victim has an audaciousness and implacable sense of principle that betrays what most would consider economic rationality; or (3) the victim is not dissuaded by the prospect of bankruptcy.

II. *ZAMORA* WAS WRONGLY DECIDED AND SHOULD BE OVERRULED.

The Court in *Zamora* observed that "[i]t is noteworthy that the statute under consideration has previously been involved in cases before this Court under differing circumstances and has not been declared unconstitutional." A more candid assessment would have been to say that the statute under consideration had never been declared *constitutional*—or that there had never been a ruling either way. The cases cited by the Court in *Zamora*, 635 P.2d. at 80 n.5, purportedly supporting its observation that the statute "has not been declared unconstitutional," were *Kiesel v. Dist. Court*, 96 Utah 156, 84 P.2d 782 (1938), and *Wright v. Lee*, 101 Utah 76, 118 P.2d 132 (1941), neither of which addressed the constitutionality of the bond statute.[7]

Contrary to the mandatory terms of the statute, the Court in *Zamora,* in an unprincipled effort to validate the facially unconstitutional statute, manufactured a

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[7] In *Kiesel*, the Court was concerned only with whether the statute permitted any "discretion in the court to permit filing of the undertaking after the motion to dismiss the complaint." 84 P.2d at 784. In *Wright*, the Court found the statute did not apply because there was no evidence the defendant had been acting in the course of his duties. In fact, the Court explicitly noted that "[t]he constitutionality of the statute cannot be passed on . . ." 118 P.2d at 135.

"flexibility" for the trial court to take account of "the plaintiff's circumstances," 635 P.2d at 8. It went so far as to twist the words "in an amount fixed by the court" as meaning the trial court could arbitrarily ignore the requirement that the bond be "for the payment to the defendant of all costs and expenses that may be awarded against such plaintiff, including a reasonable attorney's fee to be fixed by the court . . ."

Nowhere in *Zamora* is there any consideration of the court-access deprivations and other impacts of the bond requirement on plaintiffs (or prospective plaintiffs) who are *not* impecunious, nor is there any consideration of the fact that *any* bond requirement in a meritorious case is an unconstitutional taking under the Due Process Clauses of the United States and Utah Constitutions. Also, *Zamora* lacks any equal protection analysis. It simply mentions that "the statute should be so applied as to . . . afford[ ] all persons equal justice under law, and of access to the courts to serve that purpose . . ."[8]

A. LIKE THE CURRENT BOND AND UNDERTAKING STATUTES, THE STATUTE UNDER CONSIDERATION IN *ZAMORA* VIOLATED THE OPEN COURTS AND PETITION CLAUSES.

The very language of the Open Courts Clause establishes the constitutional invalidity of the bond statute under consideration in *Zamora* and the current Bond and Undertaking Statutes. Segmentation of the Open Courts Clause and emphases are helpful

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[8] The discriminatory classifications within the categories of (1) tortfeasors and (2) those who seek recovery from tortfeasors and the lack of any fair or reasonable justification for those classifications, particularly when access to the courts is at issue, are clearly violative of federal and Utah equal protection guarantees. "When persons are similarly situated, it is unconstitutional to single out one person or group of persons from among a larger class on the basis of a tenuous justification that has little or no merit." *Malan v. Lewis*, 693 P.2d 661, 671 (Utah 1984). *See also* Brief of Appellant, at 13–29.

in understanding the breadth of its protections:

> (1) **All courts** shall bc (2) **open**, and (3) **every pcrson**, for an injury done to him in his person, property or reputation, (4) **shall have remedy** (5) **by due course of law,** (6) which shall be administered **without denial** or **unnecessary delay**; (7) and **no person** (8) **shall be barred from prosecuting** or defending before any tribunal in this State, by himself or counsel, (9) **any civil cause** to which he is a party.

Other than chaining thc courthouse door, few things could create greater burdens, discouragements, and obstacles to seeking civil justice than to enact and enforce a discriminatory law that requires those, and only those, who seek accountability from law enforcement officers for injuries caused by their violations of rights purportedly protected under state law to post a bond (for which a plaintiff would have to pay a premium and provide collateral, R. 527, ¶¶ 38–43; 714) in an amount determined by a court, according to some unknown and unspecified procedure[9] and according to pure speculation by a judge, who is not capable of reasonably estimating future costs and fees that will be incurred by a defendant in a case that has not yet even been filed. R. 738–39 ("It would be very speculative. . . . There's no procedure. . . . There's no standard . . . .")

There is nothing *fair* about the bond and undertaking statutes, either during the time of *Zamora* or now. And there is certainly nothing *equal* about the application of

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[9] An experienced civil rights lawyer testified as follows:

Q: And how does one get into a court for a court's determination before you even file the complaint?

A: I don't know how that would be done except maybe the way you're doing it right now.

Q: Nine months later since we filed --

A: Yeah, nine months later.

Q: -- the complaint.

R. 739.

those statutes, which create, for one class of potential plaintiffs, such enormous burdens, uncertainties, and obstacles to obtaining access to justice through Utah courts. Yet, "[t]he clear language of [article I, section 11] guarantees access to the courts and *a judicial procedure that is based on fairness and equality*." *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985) (emphasis added).[10]

The requirement of a bond might be *possible* for *some* people to meet, but the real-world obstruction to access to the courts created by the requirement is what must be taken into account in determining whether the courts are truly "open" to "every person" to obtain a remedy "by due course of law" for an injury done to him or her. As this Court has noted, the Open Courts Clause "imposes a substantive limitation on the legislature's ability to eliminate *or unduly restrict* causes of action seeking relief for injury to 'person, property, or reputation.'" *Day v. Utah*, 1999 UT 46, ¶ 37, 980 P.2d 1171 (emphasis added).[11] A requirement that a prospective plaintiff obtain—through some unspecified procedure and without any standards—a judge's determination as to the amount of attorneys' fees and costs that will be incurred in the future by a defendant in an action not yet even filed, then post a bond (with collateral) in that amount (which in this case could have been between $30,000 and $750,000 or more, R. 266; 270), is not only an undue restriction on a person's access to the courts for justice; it is a definitive roadblock for

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[10] As noted in Brief of Appellant, at 29–30, "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances," requiring strict scrutiny of any restriction. *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983).

[11] In *Psychiatric Assocs. v. Siegel*, 610 So.2d 419, 423–24 (Fla. 1992), the Florida Supreme Court recognized that bond statutes "create an impermissible *restriction* on access to the courts." (Emphasis added.)

almost everyone who seeks to hold a law enforcement officer accountable for violations of state law.

There being no evidence presented by the City or by the State of Utah[12] supporting any purported rationale for the Bond or Undertaking Statutes, they cannot be permitted to block access to the courts for remedies for injuries caused by law enforcement officers in violation of state law.

The test to be applied to the abrogation or restriction on access to the courts under Utah's Open Courts Clause is as follows:

> First, section 11 is satisfied if the law provides an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation. . . .
>
> Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.

Berry, 717 P.2d at 680 (citations omitted).

Utilizing a similar test,[13] the Florida Supreme Court held that a fees and costs bond

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[12] The State of Utah participated in the proceedings before the trial court (*see, e.g.,* R. 650–52) and filed a Brief in this appeal (limited to advocating the constitutionality of the Undertaking Statute).

[13] *Siegel*, 610 So.2d at 423–24. The second part of the test applied in *Siegel* is stricter than this Court's present test. In *Siegel* the court described the second part of the test as requiring "a showing of an overpowering public necessity for the abolishment of the right, and finds that there is no alternative method of meeting such public necessity." *Id.* at 424. In light of the importance of protecting access to the courts, without discriminatory, undue restrictions, Kendall urges the adoption of that test by this Court.

requirement imposed on anyone who sues medical review board participants does not provide a plaintiff with an alternative remedy. *Siegel*, 610 So.2d at 424–25.

Similarly, in Utah there is no "alternative remedy" for plaintiffs seeking access to courts, without unreasonable, discriminatory, and often prohibitive restrictions, for remedies against law enforcement officers who have injured them as a result of the violation of state laws. Also, applying the second part of the test adopted by this Court in Open Courts Clause challenges, there has been no showing whatsoever of "a clear social or economic evil to be eliminated," or, even if there were such an established evil, that the restrictions to access—which will often result in the complete elimination of a remedy—are not an arbitrary or unreasonable means of achieving the objective.

A bond requirement may deter some frivolous cases, but it also deters meritorious cases. It also allows those who are willing and able to provide a bond to pursue frivolous cases. Such under- and over-breadth of a statute's operation is not reasonable, fair, or equal.

B. LIKE THE CURRENT BOND AND UNDERTAKING STATUTES, THE STATUTE CONSIDERED IN *ZAMORA* VIOLATED DUE PROCESS.

1. THE BOND STATUTE AT ISSUE IN *ZAMORA* AND THE BOND AND UNDERTAKING STATUTES AT ISSUE HERE VIOLATE PROCEDURAL DUE PROCESS.

This Court has explained the meaning and reach of procedural due process:

> The Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, §1. Procedural due process claims are evaluated under a two-part test. The first question is "whether the [complaining party] has been deprived of a protected interest" in property or liberty. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59,

> 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). If the court finds deprivation of a protected interest, we consider whether the procedures at issue comply with due process. *Id.*

Salt Lake City Corp. v. Jordan River Restor. Network, 2012 UT 84, ¶ 48, 299 P.3d 990.

The requirement of a bond and an undertaking constitutes the deprivation of a property interest[14] without due process of law. So too does a requirement that a certain category of people seeking to pursue a cause of action for damages must—without any procedure for getting before or designating a judge—go through some unspecified process so a judge may determine if a bond and an undertaking might be waived or to engage in gross conjecture and speculation about the amount of a bond or undertaking. The deprivation is made even more egregious by the fact that the purported justification for the bizarre, discriminatory Bond and Undertaking Statutes is to deter frivolous lawsuits, yet a prospective plaintiff is not provided a hearing for a determination as to whether his or her claim falls within the class of cases (*i.e.*, frivolous cases) against which the bond and undertaking requirements are supposedly aimed. That, in itself, is a taking in violation of due process. *Beaudreau v. Superior Court*, 535 P.2d 713, 720 (Cal. 1975) (in bank).

In *Zamora*, the Court recognized that the suggested purpose of the bond statute was to protect "against frivolous and/or vexatious lawsuits," 635 P.2d at 81,[15] yet it failed

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[14] "[A] vested right of action is a property righty protected by the due process clause." *Payne v. Myers*, 743 P.2d 186, 190 (Utah 1987). Also, any amount required to be paid to pursue a cause of action is a "taking" within the meaning of the United States and Utah Due Process constitutional clauses.

[15] The Court in *Zamora* recognized the discriminatory nature of the bond statute, when it noted that "the danger of filing meritless actions also exists as to other kinds of lawsuits,"

to require a due process hearing during which a court would determine whether the prospective lawsuit was "frivolous and/or vexatious." Procedural due process was not even considered in *Zamora*—just as it was not considered in any of the cases upon which *Zamora* relied, *see supra* at 7, or in any of the cases relying on *Zamora* for the dismissal of complaints because of a failure to file a bond. *See supra* at 4–5.

2. THE BOND STATUTE AT ISSUE IN *ZAMORA* AND THE BOND AND UNDERTAKING STATUTES AT ISSUE HERE VIOLATE SUBSTANTIVE DUE PROCESS.

> Both the due process clause of article I, section 7 and the open courts provision of article I, section 11 of the Utah Constitution guarantee that litigants will have [their] day in court.

Miller v. USAA Casualty Ins. Co., 2002 UT 6, ¶ 38, 44 P.3d 663. There must be "access" *and* a "judicial procedure that is based on fairness and equality." *Berry,* 717 P.2d at 675.

In assessing claims of due process violations, a heightened scrutiny applies when there is an accompanying open courts clause challenge.[16]

> [A]rticle I of the Utah Constitution, known as the "Declaration of Rights," contains affirmative guarantees of specific individual rights that are indeed fundamental. . . . [M]ost, if not all, of these rights have generated some form of heightened judicial scrutiny. . . . [T]his court has consistently applied various forms of heightened review when article I rights are at issue.
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635 P.2d at 81, yet it upheld the statute as facially constitutional without engaging in any equal protection analysis.

[16]The Brief of Appellant, at 32, restated the general rule that "Utah courts apply a rational basis standard of review to claims alleging due process violations." The discussion following that statement focuses on the failure of the Bond and Undertaking Statutes to meet that test. However, rational basis is *not* the standard of review to be applied in cases involving open courts challenges. As is made clear in the Reply Brief of Appellant, at 16–19, *heightened scrutiny* applies to the due process claims in this case because the Bond and Undertaking Statutes unreasonably burden the right of access to the courts.

> This court has wisely avoided the "analytical straitjacket" of federal equal protection analysis by avoiding a rigid test that dictates that some rights are fundamental and others are not. Instead, regarding article I, section 11 rights, this court should examine in an individualized inquiry whether a legislative enactment denies a litigant "a remedy by due course of law" in order to determine whether article I, section 11 applies to the case at hand.

Wood v. Univ. of Utah Med. Ctr., 2002 UT 134 ¶¶ 43, 50, 67 P.3d 436 (Durham, C.J., dissenting) (writing for a majority of the Court) (citations omitted).[17] The test under the appropriate heightened standard of review is as follows:

> A legislative determination to interfere with, limit, or abrogate the availability of remedies for injuries to person, property, or reputation *requires an important state interest and a rational means of implementation. The greater the intrusion upon the constitutionally protected interest, the greater and more explicit the state's reasons must be.* It is necessary for the legislature, first, and this Court, second, to balance the weight of the governmental interest at stake against the countervailing importance of the individual rights being compromised.

Condemarin, 775 P. 2d at 358 (Durham, C.J.) (emphasis added).[18]

Zamora and the trial court in this matter failed to apply that heightened scrutiny to the statutes at issue. They also failed to recognize that the requirement of any bond or undertaking was a due process "taking." Had they done so, they would have been compelled to find a violation of the plaintiffs' substantive due process rights.

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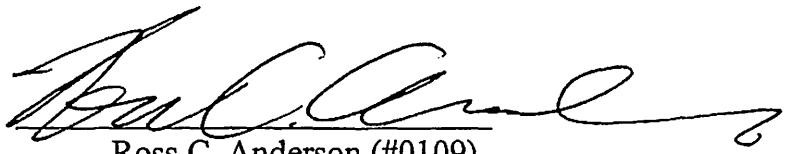
[17] *See also Hipwell v. Sharp*, 858 P.2d 987, 988 n.4 (Utah 1993); *Condemarin v. Univ. Hosp.*, 775 P.2d 348, 366 (Utah 1989); *Currier v. Holden*, 862 P.2d 1357, 1362–63 (Utah App. 1993) ("a majority of the Utah Supreme Court had agreed in the *Condemarin* opinion that analyzing the constitutionality of a state statute under the open courts provision implicated a heightened level of review.").

[18] Justice Zimmerman concurred with the section of Chief Justice Durham's opinion describing that rule, *Condemarin*, 775 P. 2d at 366 (Zimmerman, J., concurring) and, as noted by Chief Justice Durham, "the operation and effect of the equal protection test [Justice Stewart] describes is identical to the due process analysis" advocated by Chief Justice Durham's opinion. *Condemarin*, 775 P. 2d at 356 n.6.

Dated this 20th day of January, 2017:



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CERTIFICATE OF SERVCE

I, Ross C. Anderson, certify that on January 20, 2017, an original of this Supplemental Brief and ten bound copies were filed with the Clerk of the Utah Supreme Court and two copies were served upon each of the following by U.S. Mail:

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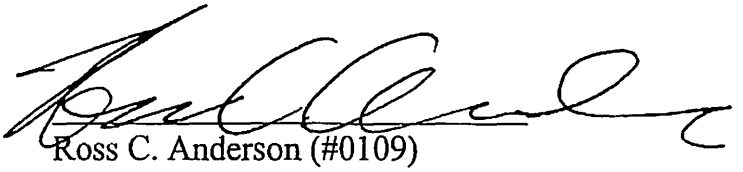

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